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The BANKING DEPARTMENT NEWSLETTER

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NOTE FROM THE COMMISSIONER

As I write this, New Hampshire is bracing for yet another storm. At least this one will be on the weekend so that we won't have to brave the snow covered roads to get to work! But, we know that spring isn't all that far away. So, these late winter storms become more like a passing nuisance than a major disruption of our lives. I, for one, enjoy the four seasons in New Hampshire. Each of them brings its own joys and its own tribulations.

As Commissioner, I have a series of "seasons." There is the budget "season" that started last summer when our first budget submission was made. Then, there are the Governor's Budget Hearings. After the Governor submits his budget, there is a hearing by the Joint House-Senate Finance Committees. Then, the appropriate Sub-committee holds a hearing on our budget. Once the budget passes the House of Representatives, the process starts again in the Senate. That season won't end until June!

Budget season overlaps the legislative season. This year, we have less Department sponsored bills but there are many others that we have to "watch." The Department asked to have two bills sponsored this year; one would combine first and second mortgage licenses into one license. The other bill would regulate money transmitters and check cashers. Look for more information on these as the legislative "season" continues.

This is also the "season" for Credit Union Annual Meetings. For me, the start is visiting Guardian Angel Credit Union in Berlin. There is nothing like going north of the Notch in February! March includes a handful of meetings. For some, I just make an appearance and say a few words of greeting. For others, I get 15 or 20 minutes to impart words of wisdom.

Like New Hampshire seasons, each of these is different. And, like New Hampshire seasons, if I didn't have these seasons, I would miss them. But, by the end of each "season", I am just as happy to see it go and a new "season" start!

Confidentiality of Examination Information

All institutions regulated by the department are reminded of the confidential nature of all information and ratings contained in the report of examinations provided by the department. RSA 383:10-b prohibits the disclosure of any information contained in the reports of examination. This statute covers all institutions regulated by the department.

Recently the federal banking and thrift agencies issued an interagency advisory to remind depository financial institutions that they are prohibited by law from disclosing their CAMELS rating and other nonpublic supervisory information without permission from the appropriate federal banking agency. The advisory is prompted by insurers who have requested or required banks and savings associations to disclose their CAMELS rating during the underwriting process for directors and officers liability coverage.

The statement can be found at: http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050228/attachment.pdf

New Personnel in the Banking Department

The department added two new staff members. Heidi O'Connor joined the department as an Accounting Technician and Jennifer Korst joined the Consumer Credit Division as a receptionist.

Escrow Rate

The escrow rate for the period February 1, 2005 through July 31, 2005 is 0.00%.

BANKING DIVISION NEWS

Charles M. O'Connor – Chief Bank Examiner

New State Chartered Entity

On December 22, 2004, the Bank Commissioner authorized Mercer Trust Company, Bedford, N.H. to open as a non-depository trust company.

Identity Theft Information

The FDIC recently conducted a study on identity theft and some of its findings are as follows:

BACKGROUND AND FOCUS OF STUDY

Identity theft is one of the fastest growing types of consumer fraud. The Federal Trade Commission (FTC) has estimated that, during 2003, almost ten million Americans discovered they were the victims of identity theft, with a total cost to businesses and consumers approaching $50 billion. The study focused on a subset of identity theft that is of particular concern to financial institutions insured by the FDIC and to the institutions' customers: unauthorized access to and misuse of existing asset accounts primarily through phishing and hacking, hereinafter referred to as "account hijacking."

PREVALENCE AND IMPACT OF ACCOUNT HIJACKING

While precise statistics on the prevalence of account hijacking are difficult to obtain, recent studies indicate that unauthorized access to checking accounts is the fastest growing form of identity theft. The FTC has estimated that almost 2 million U.S. adult Internet users experienced this fraud during the 12 months ending April 2004. Of those, 70 percent do their banking or pay their bills online and over half believed they received a phishing e-mail. Consumers are attributing risk to their use of the Internet to conduct financial transactions, and many experts believe that electronic fraud, especially account hijacking, will have the effect of slowing the growth of online banking and commerce.

FINDINGS

Fraudsters are taking advantage of the reliance on single-factor authentication for remote access to online banking, and the lack of e-mail and Web site authentication, to perpetrate account hijacking. Financial institutions and government should consider a number of steps to reduce online fraud, including:

- Upgrading existing password-based single-factor customer authentication systems to two-factor authentication.
- Using scanning software to proactively identify and defend against phishing attacks. The further development and use of fraud detection software to identify account hijacking, similar to existing software that detects credit card fraud, could also help to reduce account hijacking.
- Strengthening educational programs to help consumers avoid online scams, such as phishing, that can lead to account hijacking and other forms of identity theft and take appropriate action to limit their liability.
- Placing a continuing emphasis on information sharing among the financial services industry, government, and technology providers.

A full copy of the FDIC findings can be located at http:/www.fdic.gov/consumers/consumer/idtheftstudy/identity_theft.pdf.

Banking Information for Year End 2004

At year-end, the department regulated 64 institutions. This was comprised of 22 banks, 22 credit unions, 16 non-depositories, and 4 trust departments. Also at year-end total assets of all 64 entities were $17,581 billion, with regulatory capital at $1,896 billion, an increase of 1.84% in assets and a 5.72% decrease in regulatory capital respectively over year-end 2003. Non-depositories reported $95,289 billion in fiduciary assets, a 16.31% increase from year-end 2003.

Consumer Complaints

When the department receives a written response from a bank or credit union regarding a consumer complaint, it is department policy to forward a copy of the response to the complainant. If there is information that the bank or credit union would like to convey to only the department and no other party, the bank or credit union should send the department two response letters — one addressed to the department and one addressed to the complainant.

Policies

Policies are the conduit through which the Board of Directors 'direct' the activities of the institution. Policies are the direct responsibility of the board and should be reviewed regularly.

Both state and federal rules and regulations require policy guidance on most, if not all aspects of an institution's activities. As part of the examination process policies are reviewed for two major purposes: first to ensure that operating management is working within the boundaries of the board approved policies, and second to ensure that the policies satisfactorily outline activities as required by rule or regulation. All exceptions to policy guidance need to be brought before the board for approval. On these occasions both operating management and the board need to ensure that documentation exists concerning the justification for the policy exception and that the justification is noted in the board minutes.

Polices should be reviewed and approved at least annually by the board. In the Banking Department's experience a staggered policy approval matrix has benefited both operating management and the board in ensuring that the institution's activities reflect the guidance found within the Board's policies.

CONSUMER CREDIT DIVISION NEWS

Mary L. Jurta – Director of Consumer Credit

Change Is Good?

How many times do we hear that "change is good?" How many times do we hear that "change is good and confusing?" Not that often. In our previous Newsletter, we advised you of a change in the way criminal background checks were being processed for individuals associated with new licensees, new branch managers, senior officers or directors. We received our direction from the NH Department of Safety from whom we obtain the criminal background checks, and the new process involved a new authorization/release form, an associated $39 fee and the necessity to obtain and submit fingerprint cards. All of you were most cooperative with this change.

Now that you have become comfortable with those requirements, it's time to let you know that once again, there is a "change." This Department was informed by the Department of Safety that they would no longer be able to provide us with the more comprehensive criminal background checks that the new procedure had enabled us to get. We were also informed that we would have to use a different criminal release form and that there would be a different fee. Some of you who had background checks pending are aware of this because you received a mailing from us.

In conclusion, at this point in time, there is no fingerprint requirement; the correct criminal authorization/release form is out on our website attached to the various application packets as well as being available separately under Individual Licensing Forms at www.nh.gov/banking/consumer.html; and the fee for the background check is now $15 per individual. This is not the last time you will be hearing about this. The Department will be writing legislation that will enable us to obtain a thorough criminal background check on all individuals who are subject to disclosure.

We would like to thank you all for your resilience and cooperation. We in the licensing department are affected by these changes as much – if not more – than all of you, and your understanding and patience make it so much easier for us to implement new procedures.

Just remember – "change is good," and stay tuned for "…the rest of the story…" in later issues.

The Licensing Department

Congratulations are in order to the team in the Licensing Department for reviewing, processing and issuing renewal licenses prior to the first of the year! As you may or may not be aware, this is a daunting task that is in addition to the regular work flow. Many people can "multi-task;" but to be able to multi-task proficiently and produce quality work products in a timely manner is an art. The members of the team in licensing have been able to combine their individual strengths, knowledge and capabilities to build an organization that is able to provide quality service to the licensees of the Consumer Credit Division. If you have a reason to call the licensing department, you can expect to receive courteous, friendly and knowledgeable service from these individuals.

Despite our best efforts to provide our licensees with the tools and courtesy reminders to enable them to renew their licenses with us, there are those who, for any number of reasons, did not comply with the filing deadlines and who found themselves unlicensed at the beginning of the year. Our statutes are very specific when it comes to the licensing period and the results of not getting renewals in on time. Due to statutory changes, the leniency that was afforded in the past which allowed for the filing of "late renewals" offered a layer of comfort that is no longer available. As those of you who found yourselves in this position quickly learned, you are unlicensed for the period of time from the expiration date of your license until you have filed a new application (you cannot file a renewal application when there is no longer a license in effect) and it is approved. We will, of course, work with you to expedite the process and as much as possible, incorporate documents previously filed into your new application, but there will still be that period of time it takes to review, process and approve the new application. To prevent this from happening to you, bear in mind that the ultimate responsibility for knowing when your license expires and filing timely renewals rests with you, the licensees. Renewal license applications are required by statute to be filed with the department by December 1st for a license for the ensuing calendar year. We look forward to on-line filing capabilities to further expedite the process.

The filing deadline of February 1 for Banking Department annual reports has just recently passed, and we are still finding a great deal of confusion exists between the report that is due to the Consumer Credit Division of the Banking Department and that of the NH Secretary of State's office. We have attempted to clarify this once again in the instructions that were provided when we sent your annual report forms. The reminder card that you receive in the mail at this time of the year will be from the Secretary of State's office. The annual report you are required to file with the Secretary of State is due on or before April 1 of each year. The Banking Department annual report is due February 1st and a statutory fine of $25 per day accrues until it is filed (additional forms can be found on our website). It is important for you to recognize this, because if you receive a notice of fine from this department for failure to file your annual report or for filing it late because you did not think it was due until April 1, that reason might not be considered to be a "good cause" for waiving a fine.

Table Funding Basics

By Andrea J. Boudreau, Staff Attorney

This article is intended to highlight the basic elements of a table funded transaction, and to identify a common pitfall – misidentifying the lender on the settlement statement.

Every consumer real estate transaction begins and ends with RESPA. The Real Estate Settlement Procedures Act and Regulation X (24 CFR 3500) (collectively referred to as "RESPA") is a consumer protection statute and regulation that requires the lender to comply with certain disclosure requirements. One of the many goals of RESPA is to maintain reasonable closing costs for the borrower.

The vast majority of RESPA disclosures are made on the HUD-1 or HUD-1A, commonly referred to as the "settlement statement," which must be signed by the borrower at every real estate closing involving a federally related mortgage. In Appendix A, RESPA sets forth instructions on how to complete the settlement statement (24 CFR 3500, App. A). The first and most obvious required RESPA disclosure is the identity of the lender. Appendix A states that section F of the settlement statement must set forth the lender's name, current mailing address and zip code. In a garden variety consumer transaction, involving only one lender, section F will always be completed with the name and address of the party funding the loan.

A table funded transaction, however, involves not only the primary lender that advances the funds and is ultimately assigned the loan at or immediately after settlement, but also an additional party (e.g., a mortgage broker, a bank, a credit union, etc.) acting as a broker in the given transaction. In this instance, the broker not only "brokers" the transaction in the traditional sense, but also closes the loan in its own name.

This gives rise to a RESPA disclosure issue unique to table funding – who is the "lender" that must be disclosed in section F of the settlement statement? The answer to this question lies in how RESPA defines the two key terms: "table funded transaction" and "lender."

RESPA defines a "table funded transaction" as "a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds." By definition, table funding is not a secondary market transaction.

Generally, RESPA defines "lender" as "the secured creditor or creditors named in the debt obligation and document creating the lien." That definition, however, fails to address the question posed above. If the transaction involves both an originating broker that closes the loan in its own name (and is therefore named in the debt obligation), and also a party that advances the funds and is ultimately assigned the loan – then which "lender" must be disclosed in section F?

RESPA provides the answer. The definition of "lender" states "[f]or loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funded transaction, the lender is the person to whom the obligation is initially assigned at or after settlement." For ease of understanding, in a table funded transaction the term "lender" is meant to convey the ultimate investor (i.e., the party to whom the loan is initially assigned), while the term "broker" means the party (whether it be a mortgage broker, a bank, a credit union, etc.) that facilitated the transaction. Remember that these definitions apply to RESPA and not in any other context.

In a table funded transaction the security documents should be completed as follows: the note and the mortgage should list the broker as both the mortgagee and the party holding the note. An assignment from the broker to the lender will then be executed and recorded with the mortgage to complete the transaction. To comply with RESPA, however, section F of the settlement statement should always identify the "lender" as the party who advanced the funds and received the initial assignment of the loan (i.e., the ultimate investor).

Beyond technical compliance with federal law, the practical implications of requiring correct identification of the lender in a table funded transaction should not be overlooked. RESPA is, after all, a consumer protection statute and consumers' interests are served in this instance. For example, as stated above, one of goals of RESPA is to maintain reasonable closing costs for borrowers. In a table funded transaction, any other definition of "lender" would allow brokers to list themselves as the lender and avoid disclosing to the borrower the payment of a yield spread premium from the ultimate investor. Correct identification of the lender on the settlement statement curtails this practice, which is consistent with the disclosure requirements and overriding purposes of RESPA.

Finally, it should be noted that New Hampshire has one peculiar requirement regarding table funding. In order to be the "broker" in a table funded transaction you must be licensed as a first mortgage banker or first mortgage banker/broker. It goes without saying that the "lender" or ultimate investor must hold some sort of banker license in New Hampshire as well.

After the Examination

Once an examination is complete, the examiner in charge prepares an examination report. An invoice for the examination is prepared. The charges include a per diem rate for each day that each examiner was working on the examination. By statute, there is a minimum charge of one full examiner day. The report and bill are sent to the licensed company.

The statute allows the company 30 days, after it receives the report, to review the report and recommend in writing any changes to the report if the company feels there are factual inaccuracies. The company's written response needs to be received by the banking department on or before the 30th day. Where the examiner has observed a violation of state or federal law or rules, the company should indicate the remedial action it will take to correct the situation. The company should be aware that this 30 day period is its only opportunity to recommend changes or raise issues with the report before the report becomes legally final and accepted. A company may choose not to respond to the examination and in that case, the report automatically becomes final and accepted after the expiration of the 30 day period.

Once the company's written response has been received and reviewed by the banking department, one of several things may happen:

- Based on additional facts provided to the banking department by the company, the report may be changed to correct factual information. When a report is modified, the company has an additional 30 day review period.
- Where the report is determined to be factually accurate, the banking department will decline to make any changes to the report. A letter will be sent to the company indicating that its response has been received and reviewed and will be incorporated into the file as part of the record, but that no changes will be made to the report. If no enforcement action is contemplated, there will be a note on the letter indicating that the department has closed its file in the matter.
- The company may request a closed hearing on the matter so long as the request is made within 30 days from the date the company receives the report.
- When the company offers remedial actions to correct observations and deficiencies noted in the report, and the actions are determined to resolve the issues, the letter will be made part of the record and subsequent banking department examinations will verify that the actions undertaken by the company are in place and effectively solving the problem. A letter will be sent to the company indicating that its response has been received and reviewed and will be incorporated into the file as part of the record, but that no changes will be made to the report. If no enforcement action is contemplated, there will be a note on the letter indicating that the department has closed its file in the matter.
- Whenever a violation of state or federal law is observed in a report, the banking department weighs both the degree and seriousness of the violation including its impact on consumers and the industry and the company's response, including its initiation of corrective measures against the department's enforcement obligations. Repeated violations and violations of a serious nature may result in an enforcement action. If the department feels that an enforcement action is warranted, it will initiate an action after the report is finalized and accepted by the commissioner.

Each examination is unique and each report is evaluated on an individual basis. The above procedures represent the general criteria used by the banking department, but special circumstances and information subsequently learned by the department may dictate another course of action.

Consumer Information Privacy

We would like to remind companies about their responsibility to protect consumers' personal information. Licensed companies should develop policies and reduce them to writing regarding personal and financial information gathered from consumers in anticipation of a loan. This protection extends to documents submitted to New Hampshire registered agents in contemplation of a department examination. While the documents are at the registered agent's office, they should be protected from discovery and misuse. Once the examination is completed, the registered agent should be instructed to immediately return the documents to the licensed company that was examined.